UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - SYED IMRAN AHMED, Defendant.	CASE NO.: 1:14-cr-00277-DLI ECF Case ORAL ARGUMENT REQUESTED

DEFENDANT SYED IMRAN AHMED'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION IN LIMINE TO PRECLUDE EVIDENCE PURSUANT TO FEDERAL RULES OF EVIDENCE 401 AND 403

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Defendant Syed Imran Ahmed ("Defendant" or "Ahmed"), by and through his undersigned counsel, respectfully submits this memorandum of law in support of his motion to preclude evidence pursuant to Rules 401 and 403 of the Federal Rules of Evidence.

INTRODUCTION

As the Court is aware, the Defendant in this case is alleged to have fraudulently submitted claims to Medicare from January 2011 through December 2013. The six-count Indictment charges the Defendant with one count of healthcare fraud, three counts of false statements relating to healthcare matters, and two counts of money laundering. *See* Indictment (ECF No. 22).

On January 21, 2016, the Government informed defense counsel that it intends to introduce certain categories of evidence at trial pursuant to Federal Rule of Evidence 402, or alternatively, Rule 404(b). *See* Government Letter dated January 21, 2016 (ECF No. 84) ("January 21 Letter"). The next day, the Government provided notice of four additional categories of evidence it intends to introduce at trial. *See* Government Letter dated January 22, 2016 (ECF No. 85) ("January 22 Letter"). For the reasons set forth below, the Court should preclude the Government from introducing this evidence at trial.

ARGUMENT

I. Legal Standard

To evaluate evidence sought to be admitted pursuant to Rule 404(b), the Court must first determine whether the evidence is "introduced for a proper purpose," specifically, a purpose other than to prove the defendant's bad character or criminal propensity. *United States v. Gilan*, 967 F.2d 776, 780 (2d Cir. 1992) (citing *Huddleston v. United States*, 485 U.S. 681, 691 (1988)). If the evidence is being offered for such a proper purpose, then the court must determine whether the evidence is "relevant to an issue in the case pursuant to Rule 402, as enforced through Rule 104(b)."

Id. Rule 404(b) evidence is "[n]either presumed relevant [n]or automatically admissible." *See United States v. Halper*, 590 F.2d 422, 432 (2d Cir. 1978). Rather, the Government must demonstrate that the evidence is relevant "to an issue truly in dispute[.]" *Id.*; *see also United States v. Nachamie*, 101 F. Supp. 2d 134, 137-38 (S.D.N.Y. 2000) (stating that the government bears the burden of demonstrating the admissibility of evidence under Rule 404(b)).

"[E]ven if the evidence is deemed relevant, the trial court must still weigh the probative value of the evidence against its prejudicial consequences before admitting it." *Halper*, 590 F.2d at 432. In making this determination, the Court must first determine whether the evidence increases the likelihood of unfair prejudice.[1] *Nachamie*, 101 F. Supp. 2d at 141. If it does, the Court must "evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. . . . [A] judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point." *Old Chief*, 519 U.S. at 182-83; *see also Nachamie*, 101 F. Supp. 2d at 141 (same).

II. Evidence that the Defendant Billed Other Health Insurance Programs

The Government intends to offer evidence that "claims submitted by the defendant to the Medicare program were also in many situations submitted to . . . other insurance providers that provided supplemental coverage to the relevant beneficiaries." January 21 Letter at 2. These other providers include both Medicaid and private insurance companies. *Id.* But as the Government itself acknowledges, the Indictment in this case only charges the Defendant with crimes related to the *Medicare* program. *See id.*; *see also* Indictment (ECF No. 22). No charges have been brought against the Defendant for any crimes related to Medicaid or any other health insurance program, and evidence concerning such programs is wholly irrelevant to the crimes charged. Indeed, the Government does not even attempt to explain how this evidence is relevant at all to any issue in this case.

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[1] "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

Even if evidence concerning Defendant's billing to other insurance programs was relevant, the Court should preclude it pursuant to Rule 403. Any probative value of this evidence would be cumulative of evidence the Government undoubtedly will offer concerning the defendant's billing to Medicare. *See United States v. Awadallah*, 436 F.3d 125, 132 (2d Cir. 2006) ("Probative value is also informed by the availability of alternative means to present similar evidence."); *Nachamie*, 101 F. Supp. 2d at 145 (excluding evidence of prior conviction that would be cumulative of other evidence). On the other hand, this evidence is highly prejudicial as it may influence the jury into believing the alleged fraud is broader than the crimes charged. *See United States v. Puco*, 453 F.2d 539, 542 (2d Cir. 1971) ("The potential for prejudice, moreover, is greatly enhanced where, as here, the prior offense is similar to the one for which the defendant is on trial."). Accordingly, the Court should preclude the Government from admitting any evidence concerning the Defendant's billing to Medicaid or private insurers at trial. *See Nachamie*, 101 F. Supp. 2d at 145 (precluding government from offering evidence in Medicare fraud case of prior conviction for health care fraud); *United States v. Peterson*, 808 F.2d 969, 974-76 (2d Cir. 1987) (vacating conviction for check forgery because court improperly admitted evidence that defendant on a previous occasion had endorsed a check under another's name).[2]

III. Evidence of Additional $1 Million Transfer to Pakistan

The Indictment in this case charges Defendant with two counts of money laundering based on two transactions made from the Defendant's bank account, referenced in the Indictment as the "5668 Account." *See* Indictment ¶ 16 (ECF No. 22). Now the Government seeks to admit evidence "of a third $1,000,000 wire transaction to an account in the defendant's name in Pakistan." January 21 Letter at 2. This third transaction was allegedly made by the defendant's spouse from a separate account at TD Bank (the "4999 Account"). *Id.* The Indictment contains no allegations concerning the "4999 Account", and the Government does not state in its January 21 Letter that it intends to rely on this transaction to support its money laundering charges. Nor could it, as the Government has provided no evidence (nor even alleged) that this account contained funds that the Defendant received from Medicare.

The only purpose, it seems, for which the Government seeks to introduce this evidence is to show that the Defendant sent additional funds overseas. But such a purpose has little probative value and is highly prejudicial. This transaction has nothing to do with the crimes charged, and thus may '"lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."' *Nachamie*, 101 F. Supp. 2d at 141 (quoting *Old Chief*, 519 U.S. at 180). The fact that the

[2] Should the Court permit the Government to introduce evidence of claims submitted to Medicaid or other insurers, it should limit the evidence to the 24 patients that the Government has informed defense counsel it intends to focus on at trial. As discussed below, the Government agreed to identify the patients it intended to put forth evidence at trial in September 2015, and on this basis, Defendant did not move for a bill of particulars. *See* Defendant's Memorandum of Law in Support of His Motion for Early Disclosure of 404(b) Evidence, *Brady* Material, Jencks Act Material, and the Government's Exhibit and Witness Lists dated July 31, 2015, at p.1 n.1 (ECF No. 68). Should the Government be permitted to put forth evidence of claims submitted to Medicaid or other insurers without limit, it would make obsolete the Government's notice of the 24 patients and create an undue burden on defense counsel that the parties' agreement sought to avoid.

funds were sent to Pakistan exacerbates this concern because jurors may harbor biases against Muslims or persons of Middle Eastern descent, which could improperly influence their decision. *See United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992) ("Injection of a defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial for reasons that need no elaboration here."); *United States v. Doe*, 903 F.2d 16, 22-23 (D.C. Cir. 1990) (district court erred in admitting testimony that Jamaicans were taking over drug market because of risk that racial bias may influence jury verdict). Accordingly, evidence of the additional $1,000,000 transfer should be excluded.

IV. Evidence that the Defendant's Billing Was Disproportionate And "Spiked" in 2011

The Government seeks to introduce evidence that the "defendant's billings to Medicare for the surgical procedures identified in the indictment were grossly disproportionate to those of any other provider in the country." January 22 Letter at 2. It further seeks to introduce evidence that the Defendant's Medicare billings "radically increased beginning in approximately January 1, 2011." *Id.* The Government fails to explain, however, how this evidence is at all relevant to the issues in this case. If the Government had evidence that the Defendant *knew* his billing was disproportionate to other providers, the evidence may be relevant to his intent. But the Government has not presented any evidence – nor even alleged – that the Defendant knew his billing was higher than that of other providers. *See Contreras v. Artus*, 778 F.3d 97, 109-10 (2d Cir. 2015) (holding in habeas proceeding that New York Court of Appeal's affirmance of the exclusion of notes found in apartment of rape victim for lack of relevance was proper given that there was '"no evidence that defendant ever saw them, much less that they motivated his conduct"') (citation omitted). Nor is evidence concerning the Defendant's billing pre-2011 relevant. The charges in the Indictment relate solely to claims submitted between January 1, 2011 through December 12, 2013, *see* Indictment ¶ 12 (ECF No. 22), and thus the Defendant's billing practices before January 1, 2011 are irrelevant to the crimes charged.

Even if this evidence is relevant, it should be excluded pursuant to Rule 403 as it is highly prejudicial. The Government clearly seeks to introduce this evidence in an attempt to show that the Defendant received substantial sums of money from Medicare, either as compared to other providers or his prior practice. This evidence will undoubtedly influence jurors into deciding the Defendant's guilt based on the amount of money he received from Medicare, rather than based on proof of the crimes charged. *See United States v. Stahl*, 616 F.2d 30, 32-33 (2d Cir. 1980) (reversing conviction where prosecution's references to defendant's wealth caused undue prejudice). Accordingly, the Court should preclude the Government from introducing this evidence.

V. Operating Room Logs and "Impossible Days" Analysis

As the Court is aware, this is an extraordinarily complex and document-intensive case. The conduct underlying the Indictment spans three years and involves tens of thousands of Medicare claims. In cases such as this one, courts have ordered the government to provide a bill of particulars. *See United States v. Nachamie*, 91 F. Supp. 2d 565, 574 (S.D.N.Y. 2000) (ordering bill of particulars in Medicare fraud case). Recognizing that it would need to provide a bill of particulars, the Government agreed, in advance of briefing on Defendant's pretrial motions, to provide defense counsel with a list of patient names and Medicare claims that it intends to assert at trial are fraudulent or in any way improper by September 14, 2015. *See* Defendant's Memorandum of Law in Support of His Motion for Early Disclosure of 404(b) Evidence, *Brady* Material, Jencks Act Material, and the Government's Exhibit and Witness Lists dated July 31, 2015, at p.1 n.1 (ECF No. 68).

On September 14, 2015, the Government identified 23 Medicare beneficiaries it intends to focus on at trial. *See* Government Letter dated September 14, 2015 (ECF No. 69) ("September 14 Letter"). These 23 beneficiaries correspond to *over 2,200 claims* that the Government intends to allege are fraudulent. The Government supplemented this notice on January 8, 2016 to add an additional patient and *over 600 claims*. Now the Government seeks to introduce evidence of operating room logs to show that "there is no record of the defendant utilizing the operating rooms at times when the submitted claims indicate that he was." January 22 Letter at 2. The Government further seeks to introduce evidence that "the defendant purportedly performed more surgical procedures on certain days than was realistically possible." *Id.* The Government has not limited this purported evidence to the 24 patients identified for trial.[3] Nor has the Government identified which specific claims or procedures it intends to put forth evidence on at trial. All the Government has done is pointed defense counsel to various documents it may rely on at trial – documents that reference hundreds (likely thousands) of Medicare claims.[4] This undermines the entire purpose of the Government's September 2015 disclosure of the patients and Medicare claims it intends to put forth evidence on at trial – on which basis Defendant did not move for a bill of particulars – and creates an undue burden on defense counsel who will need to investigate these additional claims. Accordingly, the Court should order the Government to immediately disclose the specific additional claims that intends to put forth evidence at trial.

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[3] Although its September 14 letter indicated that it "may make reference at trial to other claims," *see* September 14 Letter at 2, it did not disclose the nature or scope of this additional evidence.

[4] The document referenced in the Government's January 22 Letter concerning its "Impossible Days" analysis includes over 600 Medicare claims. The documents that the Government references with respect to the operating room logs are over 200 pages of remittance statements, listing hundreds of additional claims too long to count.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that the Court grant his motion in limine precluding the Government from introducing evidence pursuant to Rules 401 and 403 of the Federal Rules of Evidence.

Dated: February 5, 2016

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